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No.

Supreme Court, U.S.
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IN THE

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CLERK

Supreme Court of the United States

OCTOBER TERM, 1987

FREEMAN M. COOPER,

Petitioner,

v.

WILLIAMSON COUNTY BOARD OF EDUCATION, *et al.*,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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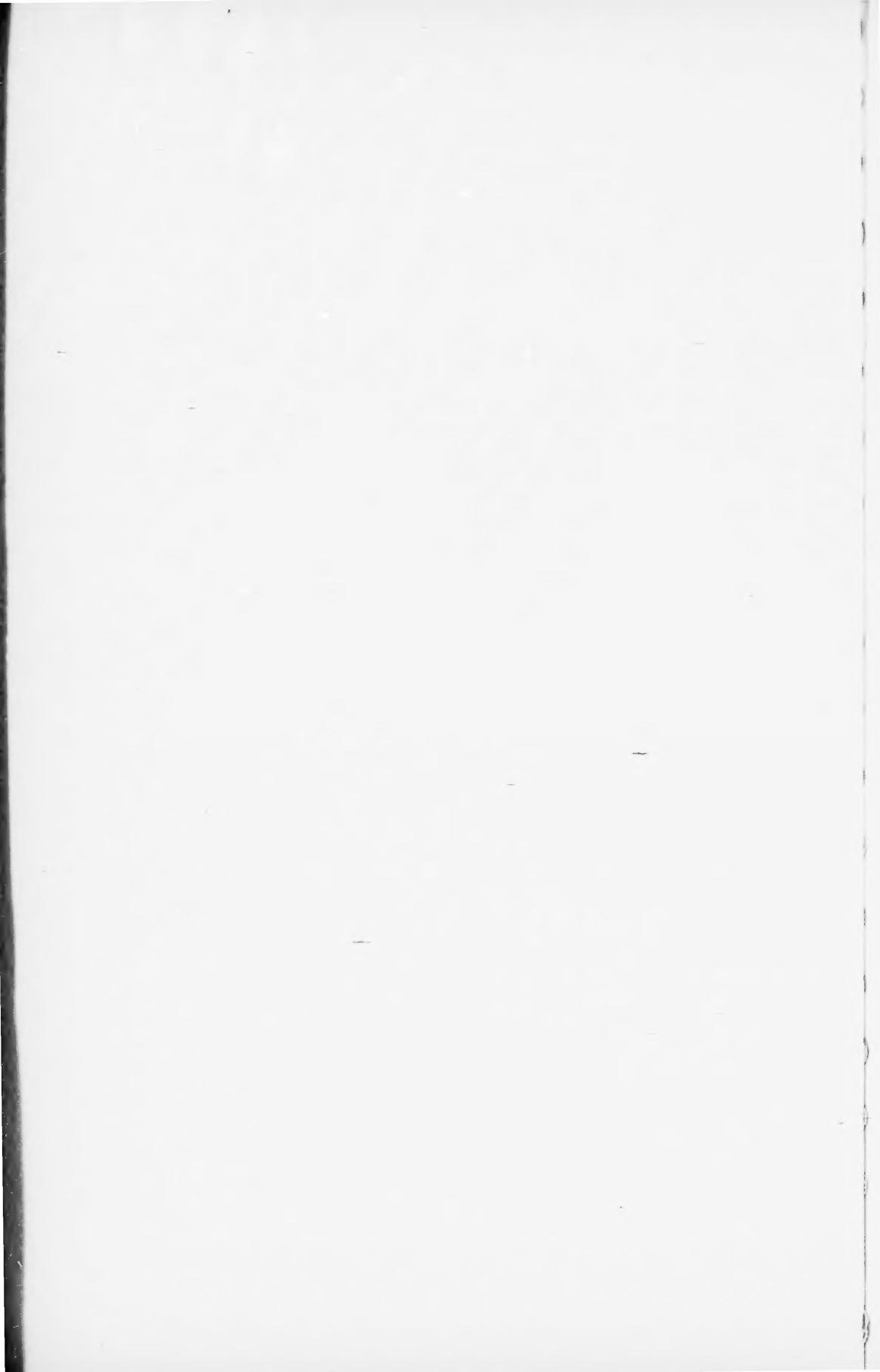
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QUESTIONS PRESENTED

1. Whether the restricted construction the court of appeals adopted of the phrase, "any action or proceeding," in Section 706(k) of Title VII of the Civil Rights Act of 1964, is in clear conflict with this Court's decision in Pennsylvania v. Delaware Valley Citizen's Council, 106 U. S. 3088 (1986), when the court of appeals, based on that restricted construction, affirmed the denial of attorney's fees for services rendered in a state administrative proceeding and when those services were necessary to protect the rights and benefits that a prevailing plaintiff had obtained in a Title VII employment discrimination action?

2. Whether, in an ongoing Title VII employment discrimination case, a district court's deference to a state administrative proceeding under the abstention doctrine, if proper, supports a claim for attorney's fees when the plaintiff prevails in the state proceeding?

PARTIES

The parties to this proceeding are Freeman M. Cooper, the Williamson County Board of Education of Williamson County, Tennessee, and Kenneth L. Fleming, the Superintendent of the Williamson County Board of Education.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

FREEMAN M. COOPER,
Petitioner,

v.

WILLIAMSON COUNTY BOARD OF EDUCATION,
et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

Petitioner Freeman M. Cooper respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit entered on June 2, 1986, and finalized by denial of Petitioner's petition for rehearing and suggestion for rehearing en banc in an order entered on July 22, 1987.

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 820 F. 2d 180 (6th Cir. 1986), and is set out in the Appendix at 1a-11a. The order denying the petition for rehearing and suggestion for a rehearing en banc, which is not reported, is set out in the Appendix at 12a-13a. The district court's memorandum decision and order denying fees, which are not reported, are set out in the Appendix at 14a-31a and 32a, respectively. The district court's judgment on relief is not reported and is set out in the Appendix at 33a-37a.

JURISDICTION

The decision of the court of appeals was entered on June 2, 1987. A timely petition for rehearing and suggestion for a rehearing en banc was

denied on July 22, 1987. This Court's jurisdiction is invoked pursuant to 28 U. S. C. § 1291(1).

STATUTE INVOLVED

Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5(k), provides:

In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT OF THE CASE

This petition for certiorari is from a decision denying attorney's fees for postjudgment services rendered in both the district court and a state proceeding arising out of an action brought under Title VII of the Civil Rights Act

of 1964, 42 U. S. C. § 2000e et seq. As aptly characterized by the court of appeals, the issue of fees for post-judgment services is "but the most recent saga of [petitioner] Cooper's fifteen year struggle to retain his position as a principal" in the Williamson County, Tennessee, public school system. Petition Appendix ("Pet. App.") 2a. Mr. Cooper's "saga" had its genesis in the much delayed desegregation of the public schools in Williamson County, Tennessee.¹

Phase One. Freeman M. Cooper, petitioner, brought this action under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e et seq., claiming that the respondents,

1. Joint Appendix filed in the Sixth Circuit in this case, at 16-33 (referred to hereinafter as "Sixth Circuit Joint Appendix").

Williamson County Board of Education ("School Board") and its superintendent, Mr. Kenneth L. Fleming, had demoted him from his position as a principal in 1976 and subsequently denied his application for principal at another high school because of his race. In the face of "dogged opposition,"² Mr. Cooper prevailed on his claim and the district court ordered the the School Board to reinstate him as a principal. (Pet. App. 15a). Fees were awarded for this phase and are not involved in this petition.

Phase Two. Less than two months after entry of the reinstatement order, the School Board, contrary to the clear mandate of the judgment decided to place Mr. Cooper in an administrative posi-

2. Pet. App. 9a (Wellford, J., dissenting in part).

tion. Mr. Cooper had to return to federal court to compel compliance with the reinstatement order. Only then did the School Board assign Mr. Cooper to a principal's position at Fairview High School.

Phase Three. Immediately upon his placement at Fairview in August 1985, Mr. Cooper was subjected to a great deal of hostility from students, teachers and others in the Fairview community. (Pet. App. 3a) Threats were made upon the lives of Mr. Cooper and the district court judge as a result of the implementation of the reinstatement order.³ Rather than deal with the sources of the hostility, the superintendent petitioned the district court, in November 1985, for leave, under the federal decree, to initiate state law dismissal proceeding

3. Sixth Circuit Joint Appendix 78.

against Mr. Cooper on the ground of, among other things, incompetency. (Pet. App. 2a). The superintendent candidly acknowledged in his motion that the disruptions at Fairview were caused by community hostility to the reinstatement of Mr. Cooper.⁴ The district court denied the superintendent's motion on the grounds that the motion sought an advisory opinion⁵ and the reinstatement order mandated compliance with state law. (Pet. App. 18a).

Phase Four. Having failed to get the district court to judicially sanction the state dismissal proceeding, the superintendent nevertheless initiated a dismissal proceeding under state law. The dismissal proceeding was grounded solely on the events growing out of

4. Sixth Circuit Joint Appendix 102.

5. Sixth Circuit Joint Appendix 79.

negative community reactions to Mr. Cooper's placement at Fairview even though he had been reinstated less than three months pursuant to the district court's order. (See Pet. App. 9a (Wellford, J., dissenting)).

After state law dismissal proceeding had been initiated, Mr. Cooper returned to the district court for further relief. He asked the district court to enjoin the proceeding on the ground that superintendent was using the proceeding to deprive him of the benefits of his federal decree. The district court denied the motion on the grounds that (1) its reinstatement order specifically mandated compliance with state law and (2) deference to the administrative School Board hearing would provide "a fair hearing and give everybody due

process."⁶ Also, the district court specifically directed the School Board to file a copy of the transcript with the court in order to determine whether the proceeding evidenced bad faith compliance with the federal decree. (Pet. App. 19a⁷).

Phase Five. The dismissal proceeding, which was conducted before the School Board, consumed portions of approximately thirteen days. Mr. Cooper specifically raised in that proceeding the issue of the superintendent's good faith compliance with the district court's reinstatement order; also, he had raised this same issue in his motion in the district court to enjoin the dismissal proceeding. Mr. Cooper was the

6. Sixth Circuit Joint Appendix 209.

7. See also Sixth Circuit Joint Appendix 209.

prevailing party in the dismissal proceeding since the School Board exonerated Mr. Cooper of all the charges the superintendent had lodged against him. (Pet. App. 16a). The School Board did not, however, rule on Mr. Cooper's federal claim concerning the good faith of the superintendent's compliance with the federal decree.

Phase Six. After prevailing in the state dismissal proceeding, Mr. Cooper again sought further relief in the district court. He sought relief on the ground that he had been constructively discharged because the School Board had placed him in a hostile and racially charged environment at Fairview. The district court denied the motion but made three critical findings relevant to the petition for postjudgment fees. First, the district court took judicial

notice that the School Board had reinstated Mr. Cooper at a school in a racially charged community, the aftermath of which bordered on "anarchy." Second, the School Board had placed Mr. Cooper in an "almost impossible" situation at Fairview. Third, the superintendent had not "given [Mr. Cooper] a chance to succeed" at Fairview before initiating the dismissal proceeding.⁸ In denying Mr. Cooper's renewed motion for further relief, the district court specifically directed him to work with the superintendent to develop a management plan for Fairview as the School Board had ordered at the conclusion of the dismissal proceeding.⁹

8. Sixth Circuit Joint Appendix, at 209-212.

9. Sixth Circuit Joint Appendix, at 212.

Mr. Cooper sought fees under Section 706(k) of Title VII, 42 U. S. C. § 2000e-5(k), for the postjudgment services rendered in the district court and in the dismissal proceeding. The district court denied the petition in its entirety. First, based on this Court's decision in New York Gaslight Club, Inc. v. Carey, 447 U. S. 54 (1980), the court held that fees in Title VII cases can be awarded only for those services performed in state tribunals which are specifically mandated by Title VII. (Pet. App. 23a). Since the postjudgment services in the state proceeding were not statutorily mandated by Title VII, the court held that Mr. Cooper was not entitled to fees for those services. (Pet. App. 20a-24a). Second, the district court ruled that, in deferring to the state dismissal proceeding, it had

not made that proceeding an integral part of the Title VII action (Pet. App. 24a-26a), even though the court specifically directed Mr. Cooper to participate in the development of a management plan for Fairview as directed by the School Board at the conclusion of the dismissal proceeding. See note 9 *supra*. Third, the court declared that the state dismissal proceeding did not constitute reasonable monitoring or implementation of the federal decree. (Pet. App. 28a-29a).

The court of appeals, in a divided opinion (Pet. App. 1a-11a), affirmed the denial of fees for essential the same reasons as those relied upon by the district court, even though the panel recognized that "as a practical matter . . . [Mr. Cooper] had to participate in the dismissal hearing to keep his" position

as a principal which he obtained only as a result of his success in his Title VII action. (Pet. App. 6). Judge Wellford, concurring in part and dissenting in part, would have allowed fees for post-judgment services rendered in the district court but otherwise joined the majority's opinion. (Pet. App. 9-11). The court of appeals also rejected Mr. Cooper's argument that the abstention doctrine supported his claim for fees. (Pet. App. 7a).

This Court handed down its decision in Pennsylvania v. Delaware Valley Citizens' Council, 106 S. Ct. 3088 (1986) (Delaware Valley I) during the pendency of this case in the court of appeals. Delaware Valley I construed the "any action" phrase in the Clean Air Act, 42 U.S.C. § 7694, to support an award of fees for post judgment services

rendered in state and federal administrative proceedings. Mr. Cooper relied heavily on Delaware Valley I in seeking reversal of the district court. The court of appeals either simply ignored or refused to follow Delaware Valley I since it did not even cite the case in its opinion. Mr. Cooper sought reconsideration in the court of appeals under Delaware Valley I in his motion for rehearing and suggestion for rehearing en banc. The court denied the motion. (Pet. App. 12a).

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S DECISION IS IN CLEAR CONFLICT WITH THE DECISION OF THIS COURT IN PENNSYLVANIA v. DELAWARE CITIZENS' COUNCIL ON THE MEANING OF THE PHRASE, "ANY ACTION OR PROCEEDING" AS USED IN CIVIL RIGHTS FEE SHIFTING STATUTES

The Sixth Circuit relied solely upon New York Gaslight Club, Inc. v. Carey, 447 U. S. 54 (1980), in holding that only a proceeding statutorily mandated by Title VII is an "action or proceeding" within the meaning of Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5(k). (Pet. App. 4-5). The construction of "action or proceeding" the court of appeals adopted is in direct conflict with the recent decision of this Court in Pennsylvania v. Delaware Valley Citizens' Council, 106 S. Ct. 3088 (1986) (Delaware Valley I).

Delaware Valley I involved a question of prevailing plaintiffs' entitlement to fees for services performed in state court and federal administrative proceedings after plaintiffs had obtained a judgment in their favor in

their federal action. This Court upheld the award of fees on several grounds. First, the Court held that the "any action" phrase in the fees awards section of the Clean Air Act, 42 U. S. C. § 7604(d), includes service performed in state and administrative proceedings after entry of a federal decree if the purpose of those services is to "protect the full scope of relief" obtained in the federal action. 106 S. Ct. 3095. Most relevant to this petition, however, this Court held that the phrase "any action," as used in the Clean Air Act, and the phrase "any action or proceeding", as used in other federal fee-shifting provisions are subject to the same construction because they have the same common purpose of promoting private enforcement of important federal policies. 106 S. Ct. 3096. Accord Hensley

v. Eckerhart, 461 U. S. 424, 433 n. 7 (1983). Second, based on Webb v. Dyer County Board of Education, 471 U. S. 234 (1985), this Court held that the post-judgment fees at issue in Delaware Valley I were useful and of the type ordinarily necessary to protect "the final result" obtained in the federal action. 106 S. Ct. 3095.

There is no principled¹⁰ basis on which to distinguish this case and Delaware Valley I and the court below made absolutely no effort to do so. Section 706(k) of Title VII uses the phrase "any action or proceeding". 42

10. Although statutory awards of fees are committed to the discretion of district courts, the exercise of that discretion requires the principled application of standards, otherwise important national policies will be frustrated by a regime of discretion that produces different results that cannot be differentiated in policy. See Albemarle Paper Co. v. Moody, 422 U. S. 405, 417 (1975).

U. S. C. § 2000e-5(k). Here, as in Delaware Valley I, statutory provisions subject to the same construction are involved. Here, as did the plaintiffs in Delaware Valley I, Mr. Cooper had a unique interest in the state dismissal proceeding because of his interest in protecting the rights he had obtained in the Title VII judgment. The court below recognized this unique interest when it correctly stated that, "as a practical matter, [Mr. Cooper] had to participate in the dismissal hearing to keep his job." (Pet. App. 6a). Here, as in Delaware Valley I, the non-federal tribunals (here the School Board) had the power to defeat the relief the plaintiffs had only recently won in the federal court. The district court ruled in favor of Mr. Cooper on the competency issue and less than three months later

the superintendent undertook to challenged that same decision in a state dismissal proceeding. Here, as in Delaware Valley I, the federal and state proceedings were related. In the instant case, the superintendent admitted the relationship between the two proceedings by candidly acknowledging that the difficulty Mr. Cooper faced at Fairview was based on hostile community reaction to the implementation of the federal court's reinstatement order.¹¹

11. Sixth Circuit Joint Appendix, at 102.

II. THE SIXTH CIRCUIT'S DECISION CREATES A CONFLICT AMONG THE CIRCUITS ON THE IMPORTANT QUESTION WHETHER ATTORNEY'S FEES SHOULD BE AWARDED TO A PARTY WHO PREVAILS IN A STATE PROCEEDING WHEN A FEDERAL COURT ABSTAINS IN DEFERENCE TO THE STATE PROCEEDING

This Court has never addressed the issue whether the "any action or proceeding" phrase in civil rights fees shifting statutes (e. g., Section 706(k) of Title VII, 42 U. S. C. § 1988) supports a claim for fees for services rendered in a state tribunal when a federal court abstains in the exercise of its jurisdiction and the plaintiff is the prevailing party in the state proceeding. The decision below has now created a conflict in the circuits on this issue. Also, the issue raises an important federal statutory question that should be addressed by this Court.

Bartholomew v. Watson, 665 F. 2d 910 (9th Cir. 982), is the seminal case

holding that the "any action or proceeding" language in civil rights fee shifting statutes supports a claim for fees when a federal court abstains in deference to a state proceeding. The Ninth Circuit held that the phrase includes fees for services rendered in a state tribunal when a federal court has abstained under the Pullman abstention doctrine (Railroad Commission v. Pullman, 312 U. S. 496 (1941)) because that construction (1) enhances the cooperation between federal and state tribunals in protecting federal rights, (2) avoids serious strains between the state and federal systems that would otherwise occur because of forum shopping, and (3) facilitates efficient allocation of issues between state and federal systems. 665 F. 2d at 913. Other courts of appeals have followed Bartholomew v.

Watson. E. g., Exeter-West Greenwich
Regional School Dist. v. Pontarelli, 788
F. 2d 47, 51 (1st Cir. 1986); Lampher v.
Zagel, 775 F. 2d 99, 103-04 (7th Cir.
1985). Justices Brennan and Blackmun,
in Webb v. Dyer County Board of
Education, 471 U. S. 234, 248-49 (1985),
have expressly approved of the holding
and rationale of Bartholomew. See also
Chrapliwy v. Uniroyal, Inc., 670 F. 2d
760, 767 (7th Cir. 1982) (fees awarded
for proceedings not mandated by Title
VII because services contributed to the
ultimate termination of the case), cert.
denied, 461 U. S. 956 (1983); 1 M.
Derfner & A. Wolf, Court Awarded
Attorney Fees Para. 13.03[2] (1986).

The court of appeals rejected the
application of the Bartholomew rule in
this case on the ground that Pullman
abstention is applicable only when a

federal court requires a litigate to clarify state law issues in a state forum before proceeding with a civil rights action in federal court. (Pet. App. 7a). The Sixth Circuit's treatment of abstention not only creates a conflict among the circuit, but is wrong as a matter of law and as a matter of fact, as applied in this case, because clarification of state law issues is not the only basis which supports abstention.

The state dismissal proceeding against Mr. Cooper was initiated only after the district court entered its reinstatement order. Mr. Cooper sought to enjoin the dismissal proceeding on the ground that the superintendent's action was an effort to deprive him of the fruits of his federal decree. The ground on which Mr. Cooper sought to challenge the dismissal proceeding clearly raised

an issue of federal law concerning whether the action of the superintendent was an attempt to deprive Mr. Cooper of the benefits of his federal decree. The district refused to enjoin the proceeding on the ground that such relief was "inappropriate at this time"¹² because it believed that the hearing would provide "a fair hearing and give everybody due process." In addition, the district court preserved the right of Mr. Cooper to return to federal court by specifically granting him leave to renew his motion after the conclusion of the state dismissal proceeding.¹³ See England v. Louisiana St. Bd. of Medical Examiners, 375 U. S. 411 (1964).

12. Sixth Circuit Joint Appendix, at 116.

13. Sixth Circuit Joint Appendix, at 116.

The rationale relied upon by the district court in refraining from deciding Mr. Cooper's motion to enjoin the state dismissal proceeding is justifiable, if at all, only on the basis of one of the abstention doctrines since the district court clearly had jurisdiction to decide the motion on the merits under the provisions of its reinstatement decree. The reinstatement decree made it a violation of the order for anyone to attempt to deprive Mr. Cooper of the benefits of the decree and the district court retained jurisdiction of the case to ensure full compliance with its judgment. (Pet. App. 35a, 37a). Mr. Cooper expressly relied upon these provisions in seeking to enjoin the state dismissal proceeding.

Of the various abstention doctrines, only Pullman or Younger (Younger

v. Harris, 401 U. S. 37 (1971)), justifies the action of the district court in deferring the exercise of its jurisdiction pending the outcome of the state dismissal proceeding. See Pennzoil Co v. Texaco, Inc., 107 S. Ct. 1519, 1526 (1987) (the various abstention doctrines are not rigid pigeonholes into which federal courts must try to fit cases since all of them are designed to soften the tension in federal-state relations). If neither Pullman nor Younger is applicable, then the district court's erred as a matter of Article III jurisprudence by declining to rule on the merits of the motion to enjoin the state dismissal proceeding since abstention from the exercise of federal jurisdiction is the exception and not the rule. Hawaii Housing Authority v. Midkiff, 467 U. S. 229 (1984).

When Mr. Cooper returned to the district court to seek further relief, after the conclusion of the dismissal proceeding, the district court again declined to rule on the merits of his postjudgment motion, opting instead to rely on the recommendation that the School Board had made in the dismissal proceeding, *i. e.*, development of a management plan for the Fairview school, as a potential solution to assuring full compliance with the federal decree. The conclusion is thus inescapable that the district court, in its deference to the state proceeding under the abstention policies, ultimately relied on the state administrative proceeding to try to effectuate implementation of the federal reinstatement decree. See Webb v. County Board of Education of Dyer County, 471 U. S. 234, 248

(1985) (Brennan, J., concurring in part, dissenting in part) (resort to state administrative proceedings might be necessary in developing and implementing a remedial plan to comply with a federal decree).

III. CONCLUSION

For the reasons above a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

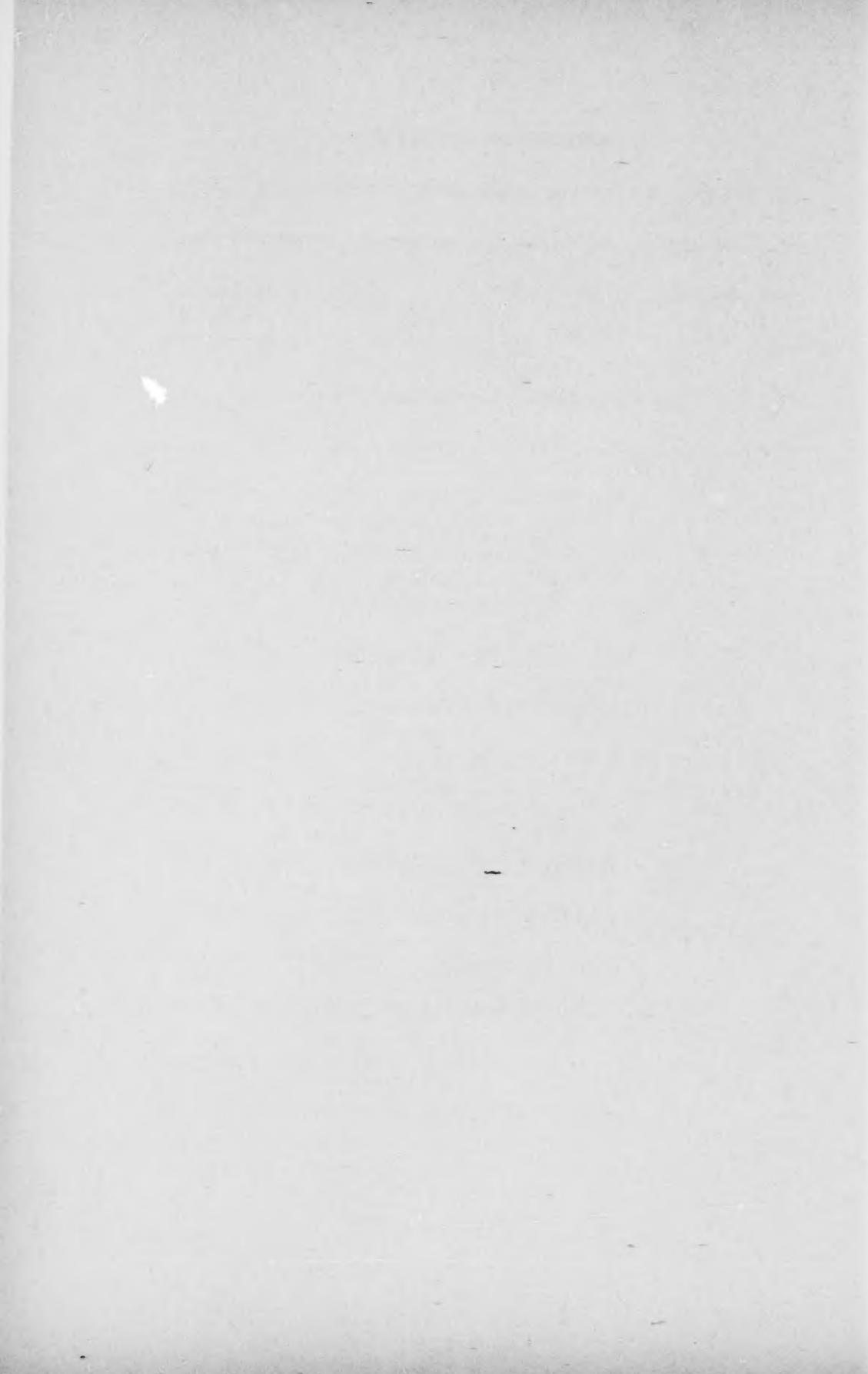
Respectfully submitted,

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APPENDIX



Nos. 85-6150, 86-5879

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FREEMAN M. COOPER,
Plaintiff-Appellant,

v.

WILLIAMSON COUNTY BOARD OF
EDUCATION and ADMINISTRATIVE
UNIT of WILLIAMSON COUNTY,
TENNESSEE and KENNETH L. M.
FLEMING, Superintendent of
Schools of Williamson County, in
his individual and official
capacity,

Defendants-Appellees.

ON APPEAL from the
United States District
Court for the Middle
District of Tennessee.

Decided and Filed June 2, 1987

Before: MARTIN, WELLFORD and NELSON, Circuit
Judges.

MARTIN, Circuit Judge, delivered the opinion of the
court, in which NELSON, Circuit Judge, joined. WELL-
FORD, Circuit Judge, (pp. 9-11) delivered a separate opinion
concurring in part and dissenting in part.

BOYCE F. MARTIN, JR., Circuit Judge. Freeman Cooper, the prevailing party in an employment discrimination action, now seeks attorney's fees under Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), for work performed in resisting dismissal charges brought subsequent to his success in the district court. The district court found that Cooper, a black school principal, had been discriminated against by the Williamson County Board of Education, and required the School Board to give him a principalship. After the School Board complied with this order, the school superintendent brought dismissal charges for incompetency before the Board under Tennessee law. Cooper, who was represented by counsel, successfully resisted the charges. When Cooper sought attorney's fees in the district court for work before the School Board, the request was denied. The state dismissal hearing, which occurred after the Title VII action, was not a proceeding under Title VII because Cooper's participation was not a condition precedent to his pursuing his employment discrimination claim in federal court. Thus, Section 706(k) does not extend to the fee request. We affirm.

I.

This appeal for attorney's fees is but the most recent saga of Cooper's fifteen year struggle to retain his position as a principal in the Williamson County public school system in Tennessee. In the culmination of this struggle in June 1984, the United States District Court for the Middle District of Tennessee ruled that the Williamson County Board of Education had discriminated against Cooper on the basis of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The district court required the Board to reinstate Cooper as a principal and the court, in order to ensure compliance, retained jurisdiction.

In August 1984 the Board placed Cooper in the principal's position at Fairview High School, thereby displacing the

experienced white principal at this predominantly white school. Cooper's year at Fairview was an eventful one to say the least, with bomb scares, student walk-outs and conflicts with the faculty. In early January 1985 Kenneth Fleming, the school superintendent, filed dismissal charges against Cooper with the Board pursuant to the Tennessee Teacher Tenure Act, Tenn. Code Ann. §§ 49-5-501 *et seq.* (providing that teachers may be dismissed only for cause and that the causes for dismissal may be incompetence, inefficiency, neglect of duty, unprofessional conduct and insubordination). Fleming argued, essentially, that Cooper was insubordinant and incompetent, and sought to have him removed from the principalship at Fairview High School. Cooper succeeded in resisting the dismissal charges.

After his success at the Board's hearings, Cooper filed a fee petition with the district court seeking attorney's fees for work performed after that court's Title VII judgment reinstating him as principal. The district court, for analytical purposes, divided the request in two parts. The first category included "services rendered prior to the date on which dismissal charges were filed, and services rendered in connection with proceedings in [the district court]." More specifically, these services included following media reports, assisting Cooper with day-to-day administrative matters at Fairview High School, filing an Equal Employment Opportunity Commission charge with respect to a matter that was not brought before the district court, and making unsuccessful motions in the district court relating to the state dismissal proceedings. The court denied this part of the request. On appeal Cooper contends that the time spent by his attorneys following media reports and assisting with administrative matters at Fairview High School constituted reasonable monitoring and implementation of the district court's prior order. As we view the record, Cooper has not appealed that part of the district court's judgment regarding the denial of fees for work performed in filing the Equal Employment Opportunity Commission charge not brought before the court, nor has he

challenged the denial of fees for work involved in making the unsuccessful motions.

The second category of legal work, which forms the crux of Cooper's appeal, "relate[d] to services rendered in preparation for, and participation in, the state dismissal proceedings." In denying this part of the fee request, the district court wrote that because the state dismissal proceedings were "not mandated by the provisions of Title VII and did not involve an attempt by [Cooper] to secure Title VII rights[,]" they were not an "action or proceeding" within the meaning of Section 706(k) and Cooper was thus not entitled to attorney's fees under that provision. Here, Cooper urges that the state dismissal proceedings were an "action or proceeding" within the meaning of Section 706(k) because those proceedings were useful and necessary to protect his Title VII rights, because the legal services provided in those proceedings constituted reasonable monitoring and implementation of the district court's prior order, and because the district court made those proceedings an integral part of the Title VII action.

II.

Under the American Rule on attorney's fees, a federal court may not, several narrow exceptions aside, award attorney's fees unless expressly authorized by Congress. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975). Cooper seeks to convince us that Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) grants that authorization. That section provides:

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs. . . .

In *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), the Supreme Court had the opportunity to consider

the application of this provision to state administrative proceedings. The Court noted that the language of Section 706(k) clearly authorizes fee awards for work done in a "proceeding" other than a court action, and thus a Title VII prevailing party may get an award for fees from the losing party for work performed in a federal administrative proceeding. *Id.* at 61. In considering whether Section 706(k) also extended to state proceedings, the Court looked at the language of the provision and then at the structure of Title VII. First, it observed that the provision "authorizes a fee award to the prevailing party in 'any... proceeding under this title.' " *Id.* at 62. Also, throughout the title "proceeding" and its plural form are "used to refer to all the different types of proceedings in which the statute is enforced, state and federal, administrative and judicial." *Id.* at 62-63 (footnote omitted).

The Supreme Court next pointed out that the same title creates an elaborate referral system in which the state and federal institutions and remedies are to work together as one system. Title VII establishes a procedural structure in which claims are referred first to available state remedies and may be prosecuted in a federal forum only after the state remedies are exhausted or the referral period expires. See *Love v. Pullman Co.*, 404 U.S. 522 (1972) (approving the referral and referral system developed by the Equal Employment Opportunity Commission under Section 706(c)). In short, the claimant must first turn to state remedies, and may use federal remedies only when the state does not provide prompt or complete relief. As the Court explained, "It is clear from this scheme of interrelated and complimentary state and federal enforcement that Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination." *Carey*, 447 U.S. at 65. The Supreme Court consequently concluded that when a plaintiff is referred to state proceedings pursuant to Title VII, the state proceeding is a "proceeding under this title" and that a court may thus make an award for work performed in the state proceedings. *Id.* at 71; cf. *Webb v. Dyer Board*

of Education, 471 U.S. 234 (1985) (holding that because 42 U.S.C. § 1983 does not require an exhaustion of state remedies as a precondition to pursuing a civil rights action in federal court 42 U.S.C. § 1988, the attorney's fees provision for § 1983 does not authorize an award for work performed in such optional state proceedings).

III

Cooper seeks fees for work performed in resisting the dismissal charges brought before the School Board after the district court rendered its judgment in his Title VII case. Section 706(k) does not extend that far, however Cooper was not referred to the dismissal proceedings sought under the Tennessee Teacher Tenure Act, Tenn. Code Ann. §§ 49-5-501 *et seq.*, and thus these were not proceedings under Title VII. That title is concerned with employment discrimination and requires referral only to state employment discrimination remedies. Cooper's dismissal charges, however, did not involve employment discrimination, but rather his competency as principal. In short, these state dismissal proceedings were not part of the "scheme of interrelated and complimentary state and federal enforcement" of the Title VII employment discrimination laws. *Carey*, 447 U.S. at 65.

True, as a practical matter and as Cooper argues, he had to participate in the dismissal hearing to keep his job, but that, without more, is not sufficient to turn the dismissal hearing into Title VII proceedings. To argue, as Cooper does, that Section 706(k) applies to these dismissal proceedings because the work was both useful and of a type ordinarily necessary to protect his Title VII rights demonstrates a misunderstanding of Title VII. Title VII forbids Cooper's employer from discriminating against him on the basis of race. It does *not* prevent an employer from discriminating on the basis of competency. If Cooper thought that the charges of incompetency and insubordination were a pretext and that the School Board or superintendent had been driven by racial animus,

he should have brought, as the district court explicitly advised him, a contempt action in the district court. He never did so and we cannot impute such invidious motives to the Board or to the superintendent.

Cooper asserts that the district court made the state competency hearing part of the district court's proceedings and hence part of the Title VII action by maintaining jurisdiction. But the district court had already granted Cooper a Title VII judgment, and in no way mandated his participation in the state proceeding. This is quite a different case from *Bartholomew v. Watson*, 665 F.2d 910 (9th Cir. 1982) (see application made under 42 U.S.C. § 1988), in which the federal court abstained under the *Pullman* doctrine and required the litigants to clarify state law issues in a state forum before proceeding with the civil rights action in federal court. In Cooper's case, the state proceedings dealt with no issue of state law that had a direct bearing on Cooper's case in district court and the court did not require him to pursue the state proceedings before returning to federal court. In fact, the district court's order requiring Cooper's reinstatement had already been satisfied and no issues remained for resolution in Cooper's Title VII claim.

Further, contrary to Cooper's assertions, the legal work performed by Cooper's counsel in resisting the state dismissal charges did not constitute reasonable monitoring and implementation of the district court's order. In making that argument, Cooper reminds us that in *Northcross v. Board of Education*, 611 F.2d 624, 637 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980), we said that "[s]ervices devoted to reasonable monitoring of the court's decrees, both to insure compliance and to ensure that the plan is indeed working to desegregate the school system, are compensable services." The *Northcross* fee application involved work performed by counsel to ensure full compliance with a complicated school desegregation plan. Here, Cooper's remedy of reinstatement had already been executed before the dismissal charges were

brought before the School Board. The district court did maintain jurisdiction over Cooper's case, but merely as a procedural step to ensure compliance.

Finally, as for the services provided by Cooper's counsel before the filing of the state dismissal charges, we must agree with the district court that they do not constitute reasonable monitoring of its earlier order. The district court's order that the Board reinstate Cooper as a principal did not require that his counsel follow media reports or advise him on day-to-day administrative matters faced in his job as principal. The district court quite correctly observed that although Cooper may consult with his attorneys about any matter, the defendants should not be required to reimburse him for work performed by his attorneys in connection with his responsibilities as principal.

The judgment of the district court is affirmed.

WELLFORD, Circuit Judge, dissenting in part. I join the majority's opinion with respect to Parts I and II. I dissent, however, from the portion of the conclusion in Part III that holds that Cooper's attorneys are not entitled to receive fees for any work they performed after the final decision was rendered in the district court and before the State dismissal hearings began. In appropriate circumstances, a district court may award post-judgment attorney's fees to the prevailing plaintiff. E.g., *Northcross v. Board of Education*, 611 F.2d 624, 637 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

The question on appeal is whether the district court abused its discretion by denying fees to the plaintiff under all the circumstances. *Coulter v. Tennessee*, 805 F.2d 146, 151-52 (6th Cir. 1986); *Rice v. Gates Rubber Co.*, 584 F.2d 135, 136-37 (6th Cir. 1978) (per curiam); see *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

Cooper, in the face of dogged opposition, won his discrimination suit against Williamson County, which was ordered to reinstate him as a high school principal. After fifteen years of struggle with the School Board, Mr. Cooper vindicated his rights. Within weeks, however, he was confronted with a "Motion for Relief" filed by Fleming, the Superintendent of Schools, in which Fleming sought permission to bring charges against him under the Tennessee Teacher Tenure Act. Fleming was the superintendent of Schools fifteen years earlier when Mr. Cooper's troubles began.

Cooper's attorneys necessarily met, discussed, and responded to Fleming's allegations of incompetency by filing, in the district court, a brief opposing the motion. All these proceedings were a direct consequence of the district court's June 22, 1984, decision enjoining the defendants from treating Cooper in a discriminatory manner. Cooper was required to oppose the motion to vindicate what he in good faith and with good cause felt to be his rights under the recent district court order. It should be noted that the district judge denied Cooper's fee request by defining the first "category" of

services—"non-Board hearing" matters—as "services rendered prior to the date on which dismissal charges were filed, *and services rendered in connection with proceedings in this Court.*" Dist. Ct. Memo. at 2 (filed Nov. 18, 1985) (emphasis added).

The district court denied fees for these services, however, because it "does not believe that the services rendered by counsel . . . constitute reasonable monitoring and implementation of [its] previous order" and because "plaintiff did not succeed on any significant issue in the litigation with respect to the proceedings in this Court during the relevant time period." Dist. Ct. Memo. at 6-7. I do not believe plaintiff under these circumstances should have been subject to a requirement that he succeed again in vindicating his rights. The court offered no reason for its conclusory assertion that the services were not a "reasonable implementation". I believe the district court improperly lumped together the attorneys' services rendered in connection with responding to the motion for relief and the services rendered in connection with reviewing media reports and assisting Mr. Cooper with the administrative aspect of his new job, the latter being non-compensable. In such circumstances, I would find that the district court abused its discretion, and Cooper's attorneys were entitled to be reimbursed for their time spent in protecting their client's interests under a very recent judgment. I would, therefore, remand for a computation of fees which should be awarded for these limited services.

Due to the unique circumstances of this case, which took place over a protracted period of time, I believe also that the district court abused its discretion to the extent it did not allow a portion of the fee request for attorneys' services rendered immediately after the court's June 22, 1984, decision. Some amount of attorney fees are warranted on this record as reasonable monitoring and implementation to insure compliance with the judgment. Defendants' prior continuous opposition over a decade and a half justified Mr. Cooper's

need to seek out and to rely upon his attorneys' advice to secure his interests under a favorable judgment. In summary then, I would reverse and remand for an award of part of the fees requested.

The district court also determined that Cooper was not entitled to attorneys' fees for representing him in the state dismissal hearing. I concur because I cannot conclude that the district court abused its discretion in this respect. *Coulter*, 805 F.2d at 151-52. I may have reached a different result in light of the long series of efforts by Mr. Fleming and Williamson County to frustrate Mr. Cooper's employment opportunities. The district court articulated, however, logical reasons for its refusal to make a fee award on this portion of the fee request. The district court properly apprehended the law to be applied. Though I may have differed on the result of applying that law to these facts, I cannot hold that the court abused its discretion with respect to this portion of the fee request. I accordingly CONCUR in this aspect of Part III of the majority's decision.

Filed July 22, 1987

No. 85-6150/86-5879

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FREEMAN M. COOPER,)
Plaintiff-Appellant,)
v.) ORDER
WILLIAMSON COUNTY BOARD OF)
EDUCATION, ET AL.,)
Defendants-Appellees)

BEFORE: MARTIN, WELLFORD AND NELSON,
Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for

rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

John P. Hehman, Clerk

Filed November 19, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

FREEMAN M. COOPER)
v.) No. 80-3393
WILLIAMSON COUNTY BOARD)
OF EDUCATION, et al.) Judge Wiseman

MEMORANDUM

Plaintiff has filed a Petition for Interim Award of Fees seeking an award of fees under 42 U.S.C. §2000e-5(k) for services rendered by his attorneys for the period of October, 1984 through April 1, 1985, the date on which the Williamson County Board of Education rendered a final decision on dismissal charges brought against plaintiff by

Superintendent Kenneth L. Fleming. The Court concludes that an award of attorneys' fees for services rendered during this period is not warranted by the attorney's fee provision of Title VII, 42 U.S.C. §2000e-5(k).

In an Order dated June 22, 1984, this Court ruled that defendant Williamson County Board of Education ("Board") had discriminated against plaintiff because of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq.; required the Board to reinstate plaintiff as a principal at one of the schools under the Board's jurisdiction; and retained jurisdiction of the action to ensure full compliance with its judgment. In that Order, this Court also awarded fees to plaintiff's attorneys

pursuant to 42 U.S.C. §2000e-5(k). During the fall of 1984, plaintiff was placed in the principal's position at Fairview High School. On January 7, 1984, defendant Fleming filed dismissal charges against plaintiff with the Board pursuant to the Tennessee Teacher Tenure Act, T.C.A. §§49-5-501 et seq. Plaintiff was ultimately successful during Board hearings in resisting the dismissal charges.

It appears to the Court that the services for which fees are sought can be divided into two separate categories. One category relates to services rendered on "non-Board hearing" matters. This category includes services rendered prior to the date on which dismissal charges were filed, and services rendered in connection with proceedings in

this Court. The remainder of the fee request relates to services rendered in preparation for, and participation in, the state dismissal proceedings.

The services rendered prior to the date on which dismissal charges were filed appear to consist of discussions concerning administrative matters relating to plaintiff's position as principal of Fairview, reviews of media reports, and the filing of an Equal Employment Opportunity Commission charge with respect to a matter that has not been brought before this Court. Services rendered in connection with proceedings in this Court relate to two motions filed during the relevant time period, both of which involved issues arising out of the state dismissal proceedings. On November 21, 1984, defendant Fleming

filed a motion for relief arising from his concern that the filing of the dismissal charges might be construed to interfere with this Court's June 22, 1984 Order. In response to this motion, plaintiff argued that because the dismissal proceedings were purely a matter of state law, the Court was without jurisdiction to consider defendant's motion. This Court dismissed defendant's motion, explaining that its previous Order in no way affected Superintendent Fleming's ability to bring dismissal charges under state law, and stated that its previous Order mandated compliance with applicable state statutes.

After Superintendent Fleming filed dismissal charges with the Board, plaintiff filed a motion seeking to enjoin the state dismissal proceedings. The

Court denied plaintiff's motion; gave him leave to revive his motion at the conclusion of the state proceedings; and requested the Board to provide the Court with a transcript of the proceedings.

The attorney's fee provision of Title VII provides:

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. §2000e-5(k).

Plaintiff contends that an award of fees is warranted because he has succeeded on a significant issue in this litigation which achieves some of the benefits sought in the suit. Plaintiff argues that he succeeded on a signifi-

cant issue in this case in resisting the attempt by defendant Fleming to dismiss him pursuant to the Tennessee Teacher Tenure Act. In addition, plaintiff argues that services rendered by his counsel during this time period were devoted to reasonable monitoring and implementation of this Court's June 22, 1984 Order.

The Court will first address plaintiff's fee request for services rendered in connection with the state dismissal proceedings. Plaintiff claims that an award of fees is appropriate for these services and relies on the Supreme Court's decision in New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 100 S. Ct. 2024, 64 L. Ed. 2d 723 (1980). In Carey, the Court held that fees may be awarded under 42 U.S.C. §2000e-5(k) to a

claimant who prevails in state proceedings to which the claimant was referred pursuant to the provisions of Title VII. The Court's decision in Carey, however, does not govern the instant case.¹

1. Similarly, the Court rejects the Board's contention that the Supreme Court's recent decision in Webb v. Board of Education of Dyer County, Tennessee, 471 U.S. ___, 107 S. Ct. ___, 85 L. Ed. 2d 233 (1985), in and of itself, defeats plaintiff's claim. In Webb, the Court held that an award of fees under 42 U.S.C. §1988 is not available to a prevailing plaintiff for services rendered by his counsel during optional state administrative proceedings initiated prior to the filing of an action under 42 U.S.C. § 1983 in federal court. Although the state proceedings at issue in Webb were brought under the same Tennessee statutes involved in the instant case, the fee request in Webb was brought under §1988. To distinguish its holding in Carey, the Webb court relied on the differences both in the wording of the applicable fee provisions, and in the functions served by state proceedings in §1983 actions, as opposed to Title VII actions. 85 L. Ed. 2d at 240-41. The Court explained that, unlike Title VII, §1983 does not require a claimant to exhaust state administrative remedies before

First, the Carey case is factually distinguishable from the instant case. The claimant in Carey initiated proceedings with the New York State Division of Human Rights complaining of racial discrimination prior to the commencement of her Title VII suit in federal court. 447 U.S. at 56-58, 100 S. Ct. at 2027-28, 64 L. Ed. 2d at 729-30. The state proceedings at issue in this case involved dismissal charges filed by defendant Fleming with the Board after the substantive portion of plaintiff's Title VII suit in this Court had been completed. In addition, the explicit hold-

bringing an action in federal court. Id. Thus, the Court concluded a claimant is not entitled to an award of fees under §1988 for state administrative proceedings. Because plaintiff brought the instant action under Title VII, the Webb holding does not govern his petition for an award of fees.

ing and reasoning of the Carey court demonstrate that its decision is inapplicable to the instant case. In reaching its decision, the Court explained that an award of fees was appropriate for the state administrative proceedings in that case because the provisions of Title VII required the plaintiff to pursue available state remedies for employment discrimination before initiating suit in federal court. 447 U.S. at 64, 100 S. Ct. at 2031-32, 64 L. Ed. 2d at 735. Moreover, the language used by the Court in setting forth its holding specifically referred to, and this Court believes is limited to, "state proceedings to which the complainant was referred pursuant to the provisions of Title VII." 447 U.S. at 71., 100 S. Ct. at 2034, 64 L. Ed. 2d at

738.² By contrast, the state proceedings at issue in the instant case were not mandated by the provisions of Title VII and did not involve an attempt by the plaintiff to secure Title VII rights. In short, the state proceedings did not serve an integral function under the provisions of Title VII.

Plaintiff argues that this Court made plaintiff's participation in the state proceedings an integral part of

2. The Supreme Court's recent decision in Webb v. Board of Education of Dyer County, Tennessee, 471 U.S. ___, 107 S. Ct. ___, 85 L. Ed. 2d 233 (1985), removes any doubt as to whether the Carey decision is limited to state proceedings mandated by Title VII. In Webb, the Court specifically stated that Carey "arose under a statute that expressly requires a claimant to pursue available state remedies before commencing proceedings in a federal forum." 85 L. Ed. 2d at 240 (footnote omitted).

his Title VII remedy. Plaintiff maintains that the orders issued by this Court in connection with the state proceedings made participation in those proceedings a condition precedent to obtaining further relief in this Court. Plaintiff mischaracterizes the substance of this Court's previous orders. In denying the applicable motions, this Court resisted attempts by both parties to involve this Court in the state proceedings. The Court did not make plaintiff's participation in the state proceedings an integral part of his Title VII remedy, but merely refused to condone or enjoin the initiation of those proceedings. Plaintiff has not alleged that the procedure utilized, or the result reached, by the Board during those proceedings, constituted racial discrim-

ination, although this Court specifically gave plaintiff leave to revive his motion to enjoin in a previous order. In short, the state dismissal proceedings were not mandated by Title VII, or this Court, and did not involve an attempt by plaintiff to enforce his Title VII rights. Therefore, this Court concludes that plaintiff's success in resisting the dismissal charges did not constitute success on a significant issue in this litigation which achieved some of the benefits sought in the suit.

Similarly, the Court is not persuaded by plaintiff's argument that the services rendered in connection with the state proceedings constitute reasonable monitoring and implementation of this Court's June 22, 1984 Order. The language cited by plaintiff in Northcross

v. Board of Education, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911, 100 S. Ct. 2999, 64 L. Ed. 862 (1980), involved a request for attorneys' fees under 42 U.S. §1988 for services provided by counsel to insure full compliance with a school desegregation plan. 611 F2d at 637. Unlike the remedy in the Northcross case, the remedy provided to plaintiff in the Court's previous order--reinstatement--had already been carried out prior to the commencement of the state proceedings. As previously noted, plaintiff has not alleged that the procedure or result reached by the Board during those proceedings violated this Court's previous order. Thus, the Court concludes that services rendered by counsel during the state proceedings do not constitute reasonable monitoring

and implementation of this Court's previous order.

In addition, the Court does not believe that the services rendered by counsel prior to the date on which dismissal charges were filed constitute reasonable monitoring and implementation of this Court's previous order. Services rendered in connection with obtaining and reviewing media reports, and in connection with a separate Equal Employment Opportunity Commission charge on a matter that has not been brought before this Court do not relate to the implementation of this Court's previous order. Although this Court recognizes that plaintiff may consult with his attorneys about any matter, it does not believe that defendants should be required to reimburse plaintiff for ser-

vices rendered by his counsel in connection with his responsibilities as principal. Implementation of this Court's previous order does not require the assistance of counsel for day-to-day administrative matters which plaintiff encounters by virtue of his position as principal. In sum, the Court concludes that these services do not constitute reasonable monitoring and implementation of this Court's previous order.

Finally, the Court concludes that plaintiff did not succeed on any significant issue in the litigation with respect to the proceedings in this Court during the relevant time period. Services rendered in connection with plaintiff's motion to enjoin the state proceedings which was denied by this Court are clearly excluded. With re-

spect to the Court's dismissal of defendant Fleming's motion for relief relating to the filing of the dismissal charges, plaintiff only "succeeded" to the extent that this Court made clear that its previous order mandated compliance with state law. The Court does not believe that this pronouncement constitutes "success" by plaintiff on a significant issue in the litigation, especially in view of the fact that two months later plaintiff sought to have the Court exercise its jurisdiction to enjoin the state dismissal proceedings.

Having concluded that services rendered during the period of the fee request do not relate to success on a significant issue in the litigation, or constitute reasonable monitoring and implementation of this Court's June 22,

1984 Order, the Court denies plaintiff's
fee request in its entirety.

/s/

THOMAS A. WISEMAN, JR.
CHIEF JUDGE

Filed November 19, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FREEMAN M. COOPER)
)
 v. -) No. 80-3393
) Judge Wiseman
)
 WILLIAMSON COUNTY BOARD)
 OF EDUCATION, et al.)

ORDER

In accordance with the accompanying Memorandum, the Court denies plaintiff's Petition for Interim Award of Fees in its entirety.

/s/ THOMAS A. WISEMAN, JR.
CHIEF JUDGE

Filed June 22, 1984

IN THE UNITED STATES DISTRICT COURT FOR
THE
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FREEMAN M. COOPER)
Plaintiff,)
v.)
-) CIVIL ACTION
-) NO. 80-3393
)
WILLIAMSON COUNTY BOARD)
OF EDUCATION, et. al.,)
)
Defendants.)

FINAL ORDER

Pursuant to the Court's Order of
May 20, 1983, and its accompanying
Memorandum; the October 6, 1983, Report
and Recommendation of the Master; the
hearing held on March 30, 1984 on the
parties' objections to the Master's rec-
ommendations, and the Stipulation of the
parties attached hereto, IT IS ORDERED
AND DECREED that,

1. The defendant, Williamson County Board of Education (Board), discriminated against the plaintiff, Freeman M. Cooper, because of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., in the manner in which the Board selected the principal for Page High School in 1974. The Board also discriminated against Mr. Cooper in violation of Title VII with its demotion of him from his principalship in 1976.

2. The Board, its officers, agents, employees, successors and all persons in active concert with them are permanently enjoined and restrained from engaging in conduct, acts, or practices found to be unlawful in the Court's Memorandum and Order of May 20, 1983.

3. It shall be a violation of this Order from the Board, its officers, agents, employees, successors, and all persons or organizations in active concert or participation with them to deny, deprive, or to attempt to deprive Mr. Cooper of the rights and benefits to which he is entitled by the terms of this Order.

4. No later than the beginning of the 1984-85 school year, the Board shall reinstate Mr. Cooper as a principal, with all the rights, duties, and responsibilities, at a school which is as comparable as possible to the principalship at Page High School.

5. The Board shall credit Mr. Cooper with all of the fringe benefits, e.g., sick leave, annual leave, pension and/or retirement credits, to which he

would have been entitled as a principal had he not been demoted in 1976.

6. The Board shall pay Mr. Cooper back pay for the period through the end of the 1983-84 school year. Pursuant to the equitable power vested in this Court under 42 U.S.C. § 2000e-5(g), the Board is ordered to pay Mr. Cooper prejudgment interest at the rates provided in 28 U.S.C. § 1961, as amended by § 203 of the Federal Courts Improvements Act of 1982, P.L. 97-164. Pursuant to the stipulation of the parties, the back pay award plus interest the Board shall pay to Mr. Cooper is \$79,441.66. Mr. Cooper is entitled to postjudgment interest until he is paid.

7. The Board shall pay Mr. Cooper's costs of this action in the amount of \$599.50.

8. Pursuant to 42 U.S.C. § 2000e-5(k), the Board shall pay to Mr. Cooper's attorneys the following amounts as reasonable attorney's fees: Richard Manson, \$12,090.30; Robert Belton, \$32,394.10.

9. The Court retains jurisdiction of this action to ensure full compliance with its judgment.

/s/

THOMAS A. WISEMAN, JR.
UNITED STATES DISTRICT JUDGE

JOSEPH F. SPANICK
CLERK

In The
**SUPREME COURT OF
THE UNITED STATES**

October Term, 1987

FREEMAN M. COOPER,

Petitioner,

VS

WILLIAMSON COUNTY BOARD OF EDUCATION, et. al.,

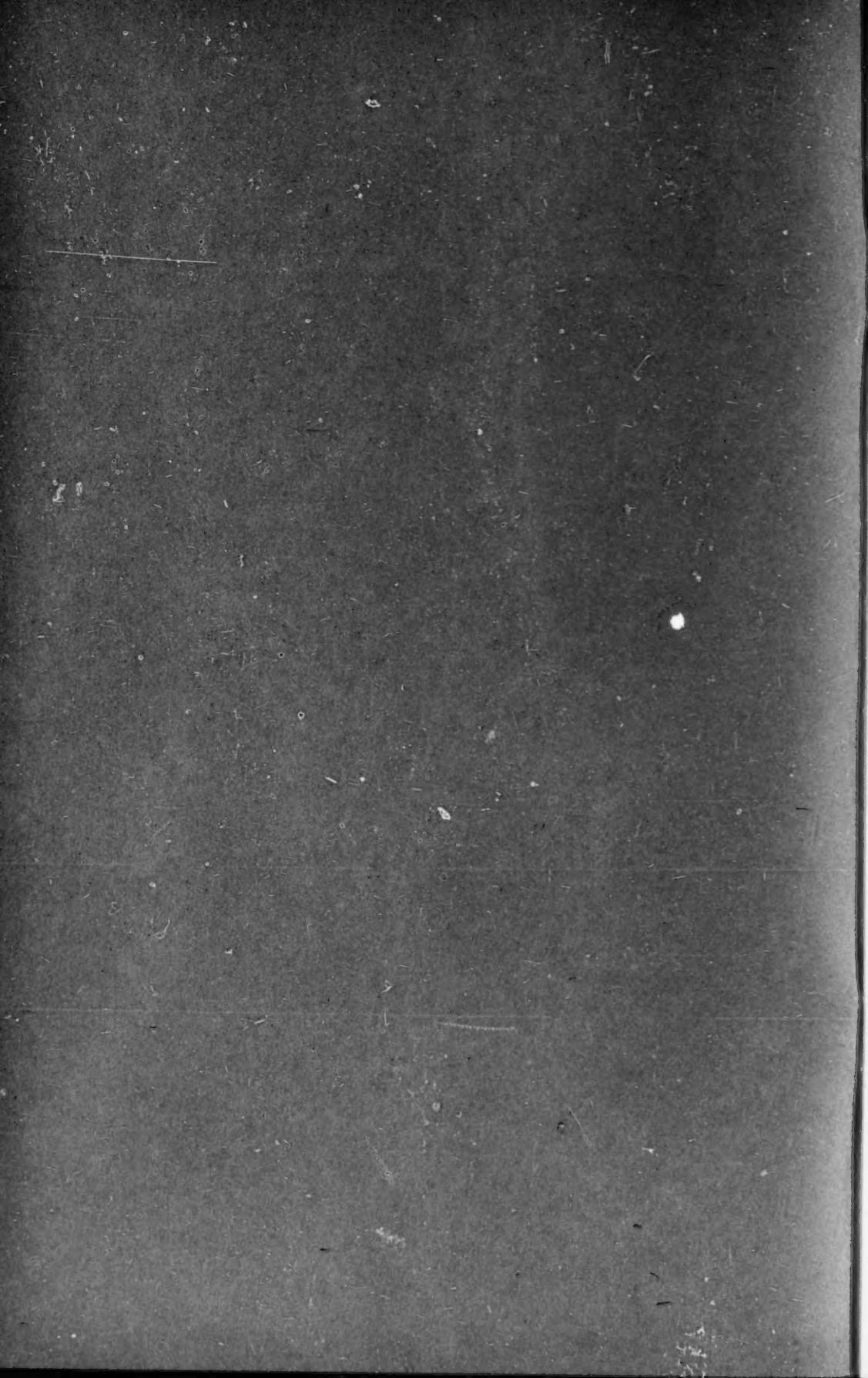
Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

RESPONDENTS' BRIEF IN OPPOSITION

Robert G. Wheeler, Jr.
2917 Foster Creighton Dr.
Nashville, TN 37204

Counsel of Record for the Respondents



QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court and Sixth Circuit erred in denying Petitioner's attorneys fees pursuant to Section 706 (k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 e-5 (k) for work performed in a hearing pursuant to the Tennessee Teacher Tenure Act after he had won his Title VII Action.
2. Whether or not the lower courts erred in stating that the teacher tenure hearing was not so related to the Title VII Action previously won by the Petitioner as to justify the payment of fees pursuant to 42 U.S.C. § 2000 e-5 (k).
3. Whether or not the lower courts erred in ruling that the work performed by Petitioner's counsel after his appointment to the principalship at Fairview High School for so-called "monitoring" services was not compensable under 42 U.S.C. § 2000 e-5 (k).

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OPINION BELOW

The Opinion of the Sixth Circuit Court of Appeals is correctly cited in the Petition at 820 F. 2d 180 (6th Cir. 1986), and is correctly set out in the Appendix in the Petition at 1a-11a. The same is not repeated herein.

The order denying the Petition for Rehearing and Suggestion for Rehearing En Banc is also correctly set out in the Petition's Appendix at 12a-13a and is not repeated herein.

The district court's memorandum decision and order denying fees are correctly set out in the Petition's Appendix at 14a-31a and 32a and are not repeated herein.

o

STATEMENT OF THE CASE

The following addition to the statement of facts submitted by the Petitioner is submitted:

1. No request has ever been made by plaintiff's counsel at the district court level for fees for that portion of the proceedings identified as Phase Two in the Petition. The Petition for an Interim Award of Fees filed with the district court and from which this appeal lies plainly states that "The period covered in this petition is from October 1984 to and including April 1, 1985,..."¹ Phase Two pre-dates October 1984.
2. That portion of the Petition identified as Phase Three at pages 6 and 7 is incomplete. The grounds upon which dismissal proceedings were commenced against Petitioner in

¹Sixth Circuit Joint Appendix 214

January, 1985, were inefficiency, neglect of duty, insubordination and incompetency.² The causes of problems at Fairview High School were due to the Petitioner's refusal to meet the responsibilities of the principalship he fought so hard to attain.³

Moreover, on November 21, 1987, defendant Kenneth L. Fleming filed a "Motion for Relief" in the district court seeking permission to file certain charges against Petitioner in accordance with the Tennessee Teacher Tenure Act.⁴ Due to his concern that the filing of such charges might be construed to violate the district court's order of June 22, 1984, Mr. Fleming requested permission to produce proof to satisfy the court that the charges were unrelated to the court's previous order and that they dealt strictly with day-to-day operations of the school under state law.⁵

In December 1984, Petitioner responded to Mr. Fleming's motion and asserted that: (1) The district court did not have subject matter jurisdiction over the matter, which was one of purely state law; (2) Mr. Fleming had no standing to file the motion; and (3) the district court should abstain from hearing purely state law claims.⁶

On December 28, 1984, the district court dismissed Mr. Fleming's Motion for Relief, stating that its previous order of June 22, 1984, mandated compliance with applicable state law.⁷

On January 7, 1985, Mr. Fleming formally presented his charges to the school board and a hearing was held pursuant

^{2&3}Sixth Circuit Joint Appendix 94-103

^{4&5}Sixth Circuit Joint Appendix 65-68

⁶Sixth Circuit Joint Appendix 69-77

⁷Sixth Circuit Joint Appendix 78-79

to state law, *Tenn. Code. Ann.* § 49-5-511 et seq. State law was followed throughout the administrative proceedings.

3. That portion of the Petition identified as Phase Five (at pages 9 & 10) is incomplete in that the School Board made no findings of fact on any of the charges but simply dismissed them with no elaboration.⁸

4. During the proceedings identified as Phase Six in the Petition, the Petitioner was asking for constructive discharge during a time that he was purportedly out sick but had not formally requested sick leave of the school system.⁹

The Petitioner recognized that the state dismissal hearings were not a part of the Title VII action when he asserted that the court did not have subject matter jurisdiction over the school board proceedings since they were a matter of purely state law. He further conceded that the dismissal charges brought by the Superintendent were not based on the district court's order of June 22, 1984, but rather on the Tennessee Teacher Tenure Act. (See note 6 supra.)

SUMMARY OF REASONS FOR DENYING THE WRIT

The case of *Pennsylvania v. Delaware Valley Citizens' Council*, 106 S.Ct. 3078 (1986) is distinguishable from the case at bar. The Sixth Circuit had the benefit of the *Delaware Valley Citizens Council*, id., case upon the Petitioner's application for rehearing and suggestion for rehearing en banc. Not one judge of the entire Sixth Circuit requested a vote on the suggestion for rehearing en banc. The original panel con-

⁸Sixth Circuit Joint Appendix 270

⁹Sixth Circuit Joint Appendix 192

cluded that the issues were fully addressed on original submission of the case.¹⁰ *Delaware Valley* does not destroy a trial judge's statutory discretion in the awarding or denial of attorney's fees in a Title VII case with the factual circumstances as appears in this case.

REASONS FOR DENYING THE WRIT

I. CONTRARY TO PETITIONER'S CONTENTION THIS CASE'S RULING FROM THE SIXTH CIR- CUIT IS NOT IN CLEAR CONFLICT WITH *PENNSYLVANIA V. DELAWARE VALLEY* *CITIZENS' COUNCIL*

The statute in question, Section 706 (k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (k) states as follows:

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs...

It is readily evident from this statute that discretion still exists over the awarding of attorney's fees in this case. *Delaware Valley* acknowledged that discretion when quoting from *Webb v. Board of Education of Dyer County*, 471 U.S., 85 L.Ed. 2d 233, 105 S Ct. 1923 (1985).

There, we noted that for the time spent pursuing optional administrative proceedings properly to be included in the calculation of a

¹⁰Pet. App. 12a-13a

reasonable attorney's fee, the work must be "useful and of a type ordinarily necessary" to secure the final result obtained from the litigation. *Id.* at _____, 85 L.Ed 2d 233, 105 S Ct 1923. *Application of this standard is left to the discretion of the district court.* *Id.* _____, 85 L Ed 2d 233, 105 S Ct 1923. (Cited from *Delaware Valley*, 92 L.Ed 2d 453, 454.) (Emphasis supplied)

Whereas the Court in *Delaware Valley* opined that the work performed by the citizen's committee was "useful and of a type ordinarily necessary to secure the final result," Judge Wiseman was equally correct in denying the sought for fees when the final result in the instant case had already been obtained.

The type of case presented in *Delaware Valley* was much more akin to the relief sought in *Northcross v. Board of Education*, 611 F. 2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980). In the former the plaintiffs sought to compel the Commonwealth of Pennsylvania to implement a vehicle emission inspection and maintenance program pursuant to the Clean Air Act. 42 U.S.C. 7410. In the latter the plaintiffs sought the desegregation of a school system. In both, wide sweeping changes occurred and extensive work by the plaintiffs attorneys was "useful and necessary" to affect such change.

In this case the Petitioner brought an employment discrimination case in which he prevailed and for which his attorneys were paid. He was given a job as a principal in the Williamson County School System. No long term monitoring process was necessary thereafter to see if he secured his

remedy. And, again, when the school superintendent filed a motion for relief with the district court to proceed according to the state tenure law, the Petitioner's attorneys asserted that the two proceedings, the hearing pursuant the state tenure act and the previously filed Title VII case, were entirely separate; the relief sought by the Superintendent was brought under the state tenure act, not the Title VII relief previously awarded the Petitioner.¹¹

Thus, *Delaware Valley* and this case are readily distinguishable. The remedy sought in *Delaware Valley* had not been attained at the time of the disputed work by its attorneys. Petitioner's attorneys had obtained the remedy sought and been paid for their work.

II. THE SIXTH CIRCUIT AND DISTRICT COURT
DID NOT ERR IN FINDING THAT THE STATE
DIMISSION HEARING UNDER THE TENNES-
SEE TEACHER TENURE ACT WAS NOT AN
"ACTION OR PROCEEDING" UNDER 42 U.S.C.
2000 E-5 (K)

It is the Respondents' position that *Delaware Valley*, *supra.*, does not overrule *New York Gas-Light Club, Inc. v. Carey*, 447 U.S. 54 (1980). The procedural structure established by Title VII and referred to in the Sixth Circuit's opinion¹² still remains an integral part of Title VII law. The Sixth Circuit was correct in finding that the state proceedings in this case were not referred to the School Board by the district court pursuant to Title VII. The Sixth Circuit expressly held that when the fees at issue were incurred, "No issues remained for resolution in Cooper's Title VII claim." The Petitioner seeks

¹¹ Sixth Circuit Joint Appendix 73

¹² Pet. App. 5a

to create the misimpression that Judge Wiseman's words "...a fair hearing and give everybody due process" show that the district court deferred a federal question to the school board. The district court later rejected this mischaracterization.¹³

This argument also makes little common sense. Why would a federal judge defer a federal civil rights question to the very body the Judge had ruled had discriminated against the plaintiff?

The Petitioner also mischaracterized the Judge's instructions to Cooper in which the Judge told Cooper to comply with the school system's sick leave policy and to comply with his duty under the Board's mandate to develop a management action plan.¹⁴

It should be noted here that the district court left avenues open to the Petitioner under the original action, and the Sixth Circuit readily acknowledged his right to come back before the district court in the form of a contempt petition.¹⁵ Petitioner's attorneys chose not to pursue a contempt petition after having taken the Superintendent's deposition.¹⁶

Thus, under the facts of this case the Sixth Circuit was correct in stating that "the district court did maintain jurisdiction over Cooper's case, but merely as a procedural step to ensure compliance."¹⁷

¹³Pet. App. 25a

¹⁴Sixth Circuit Joint Appendix 212

¹⁵Pet. App. 6a-7a

¹⁶Sixth Circuit Joint Appendix 160

¹⁷Pet. App. 8a

III. UPON CLOSE CONSIDERATION OF THE WORK PERFORMED THE DISTRICT COURT AND THE COURT OF APPEAL DID NOT ERR IN DENYING THE REQUESTED FEES

Generally, the first time frame that the Petitioner seeks fees is from June 22, 1984, the date of the district court's order granting him his remedy, until August 1984, the time at which he was specifically placed as principal of Fairview High School. As stated previously, there has been no request for these fees at the district court level since the petition only pertains to those fees incurred between October 1984 and April 1, 1985. (see note 1 *supra*.)

The second phase of the fees that are sought by the petitioner pertain to the time after which he was placed as principal of Fairview High School and until the commencement of dismissal proceedings. During that period of time so-called monitoring functions were being performed by Petitioner's attorneys. The district court properly rejected those functions as being unreasonable.¹⁸ The Petitioner's attorneys were not hired to run Fairview High School on a day to day basis and the functions for which they are seeking reimbursement amount to just that. The district court properly rejected those fees and the Sixth Circuit properly affirmed that decision in stating that the remedy for which the Petitioner had first brought his case had long since been awarded.¹⁹ Additionally, the Sixth Circuit properly differentiated *Delaware Valley and Northcross*, *supra*. in that the work involved in those cases were to insure complicated, long term compliance

¹⁸Pet. App. 29a

¹⁹Pet. App. 7a-8a

with the Clean Air Act, 42 U.S.C. 7694 (d) and a complicated and long term school desegregation plan.

The third and final phase for which the Petitioner's attorneys seek fees for this case are in defending the dismissal charges under the Tennessee Teacher Tenure Act. The Petitioner mischaracterized the nature of the proceedings. Even if the proceedings had resulted in the Petitioner's dismissal, that outcome would not have affected his remedy under his Title VII case, i.e. a principalship and the right to be free from racial discrimination.

The Petitioner's reliance on the fact that his competency, insubordination, inefficiency and neglect of duty was an issue in both the Title VII action and the dismissal proceedings is misplaced. Plaintiffs would have us believe that "competency, inefficiency, insubordination, and neglect of duty" is stagnant and does not change with time or differing circumstances. The dismissal proceedings involved an entirely different creature: Petitioner's competency, inefficiency, insubordination, and neglect of duty *since* the execution of the reinstatement order.

Petitioner's contention that the district court's orders in connection with the state administrative proceedings made the school board hearing a judge-made prerequisite to the Petitioner obtaining further relief in federal court under Title VII is without merit. In denying applicable motions, the district court "resisted attempts by both parties to involve this court in the state proceedings. The court did not make the plaintiff's participation in the state proceedings an integral part of his Title VII remedy, but merely refused to condone or enjoin the initiation of those proceedings."²⁰

²⁰Pet. App. 25a

The district court simply did not require the plaintiff to participate in the state court proceedings as a condition precedent to obtaining further relief in federal court.

IV. THE CASE HAS NO SIGNIFICANCE BEYOND THE IMMEDIATE FACTS AND PARTIES.

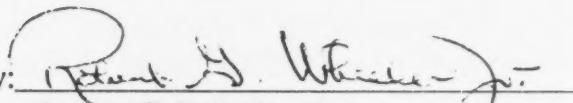
This Court generally seems to extend certiorari jurisdiction only to adjudicating Constitutional issues, questions of national importance, settlement of conflict among the circuits, etc. As the Court has said, certiorari jurisdiction "is a jurisdiction to be exercised sparingly and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision". *Hamilton-Brown Shoe Co. v. Wolfe Bros. & Co.*, 240 U.S. 251, 257-258, 36 S.Ct. 269, 271, 60 L.Ed. 629, 633 (1913). None of these extraordinary matters seem to be present in the case at bar.

Thus, even if the case were wrongly decided below, in granting certiorari, this Court would be performing a mere error-correcting function that would be of no importance except to the litigants themselves. In such a case, the Court considers the granting of a writ to be inappropriate. *Rudolph v. United States*, 370 U.S. 269, 271, 82 S.Ct. 1277, 1278, 8 L.Ed.2d 484, 486 (1962).

CONCLUSION

For reasons set out herein, the Respondents respectfully urge the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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